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IN THE

Supreme Court of the United States

APRIL TERM, 1966

NO. 1229

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COMMONWEALTH OF PENNSYLVANIA

v.

JAMES R. McCARTHY,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

(First Case)

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

(Second Case)

L. PAT MCGRATH
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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania refusing to allow an appeal from the judgment and sentence of the Court of Quarter Sessions of Allegheny County, Pennsylvania in that your Petitioner was denied due process of law.

OPINION BELOW

The Superior Court of Pennsylvania affirmed the judgment of the trial court without opinion. The Supreme Court of Pennsylvania filed no Opinion but merely refused to hear the appeal of your petitioner.

Constitutional Rules Involved.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1257 (3) and Rule 22 (1) of this Court. The Supreme Court of Pennsylvania entered judgment affirming the lower court. On February 10, 1966, the Supreme Court of Pennsylvania refused a Petition for Reconsideration filed by your petitioner.

QUESTION PRESENTED

Must a Court en banc hearing post-trial motions after conviction be composed of at least one local judge?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED.

1. United States Constitution, Amendment Fourteen: * * * that "nor shall any state deprive any person of life, liberty or property without due process of law."

2. 28 U.S. C. Sect. 1257 (3) provides: "1257 (3) State Courts, Appeal, Certiorari. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3.) By Writ of Certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States". June 25, 1948, C-646, 62 Stat. 929.

STATEMENT OF THE CASE

The petitioner was prosecuted for the crime of cheating by fraudulent pretenses under the Act of June 24, 1939, P.L. 872 Sect. 836, 18 Purdon's (Pa.) Statute, Section 4836. Two indictments were tried before the Honorable Alton A. McDonald of the 47th Judicial District Specially Presiding and a jury in the Court of Quarter Sessions of Allegheny County, Pennsylvania at Nos. 672 and 673 September Sessions 1963. The Jury returned a verdict of Guilty as to both indictments on April 15, 1964. After the verdict, the petitioner moved for a new trial and in arrest of judgment.

Before the said motions were heard, the petitioner was again brought to trial before the Court of Quarter Sessions of Allegheny County, Pennsylvania at Nos. 513 to 531 April Sessions, 1963 the Honorable Lloyd F. Weaver, of the 18th Judicial District. Specially Presiding, and a Jury. The petitioner was charged with nine counts of false pretense under the statute cited above, with nine counts of fraudulent conversion under the Act of June 24, 1939, P.L. 872, Sect. 836, 18 Purdon's (Pa). Statutes. Sect. 4834, and one count of conspiracy to cheat and defraud under the same Act, 18 Purdon's (Pa.) Statutes, Sect. 4302. The trial court sustained demurrers to two counts of false pretense and to two counts of fraudulent conversion. The jury found the petitioner and a co-defendant not guilty of conspiracy. The jury found the petitioner guilty on all other counts.

Motions for a new trial and in arrest of judgment were filed after the Second trial.

On October 16, 1964, a Court in banc composed of the Honorable Lloyd F. Weaver and the Honorable

Alton A. McDonald held a combined hearing to consider the motions for new trial and in arrest of judgment from both trials of the petitioner. Each of the members of the Court in banc was a visiting judge, being from a County other than the one in which the petitioner was tried. Each of the members of the Court in banc also presided at a trial of the petitioner which formed a basis for the post-trial motions to be considered.

The Court in banc on November 20, 1964, denied the motions for new trial and in arrest of judgment in each case.

On January 19, 1965 your petitioner appealed to the Superior Court of Pennsylvania: the first case at No. 126 April Term, 1965 and the second case at No. 127 April Term, 1965. On October 15, 1965 the Superior Court, without opinion, affirmed the judgments and sentences of the Courts below. A Petition for rehearing was filed in the Superior Court which petition was denied on November 9, 1965.

On November 9, 1965 a Petition for Allowance of Appeal was submitted to the Supreme Court of Pennsylvania, Western District, at No. 2697A Miscellaneous Docket 1965. The Supreme Court, on December 20, 1965 denied the Petition for Allowance of Appeal. A Petition for Reconsideration was denied by the Supreme Court on February 10, 1966.

ARGUMENT

There is no statute in Pennsylvania which specifically provides that a Court in banc must hear motions for a new trial and in arrest of judgment after conviction in a criminal case. Nor is there any statute specifically setting down the rules regarding the composition or manner of selection of the members of such a Court. We must, therefore, look to the case law.

Pennsylvania Equity Rule 71 provides as follows:

> "If exceptions are filed they shall be placed upon the Argument List, as upon a rule for a new trial, and heard by the Court in banc, which shall sustain or dismiss them, in whole or in part, and affirm, modify or change the decree nisi accordingly".

In *Com. of Pa. v. Parker et al., Appellants,* 294 Pa. 144 (1928), the Supreme Court of Pennsylvania remarked: "Under Equity Rule 71, all motions for new trials must be heard by the court in banc: (Citing) Carney v. Penn Oil Co., Appellant, 289 Pa. 588, (1927) Stone v. New Shiller B. & L. Assn, et al., appellant, 293 Pa. 161 (1928) and authorities there cited . . . . In civil cases the court hearing motions for a new trial must sit in banc.

There is no statutory requirement nor decision in Pennsylvania that motion for a new trial in a homicide case must be heard in banc, yet this very proper practice prevails in the larger judicial districts of the state and had a request been made and refused that this course be pursued by the court below we might have returned the record to give us the benefit of such a review."

In the later case of *Com. of Pa. v. Robinson, Appellant,* 102 Pa. Superior Ct. 46 (1931) the Court said:

> "It appears, therefore, that it is well established that in Civil Cases a judge cannot refuse to have a motion for a new trial decided by a court in banc. We can think of no sound reason which should make a distinction between civil and criminal cases in this important matter.
>
> Certainly liberty is as valuable as property and should be given at least equal protection."

It is not the contention of the petitioner that he was denied a Court in banc. It is his contention that he was entitled to a court in banc which was *duly constituted* and that he did not have.

To ascertain what a duly constituted Court in banc is we must turn again to case law in civil matters. A ground rule was set forth in *McCormicks Contested Election,* 281 Pa. 281:

> "Where a court is acting as a whole, or in banc, *all the judges* constituting the tribunal, or as many of them as may be available at the time, ought to sit together so that the litigants, and the higher court when called on to review may have the benefit of the judgment of each member, or as many of them as may be available for service." (Italic ours)

This was elaborated upon in *Carney v. Penn Oil Co., Appellant* 289 Pa. 588 (1927) where the Court, referring to Equity Rule 71 cited above said: "This Rule and its predecessor, to the same effect, have been construed by this Court to mean that the court in banc, which must hear the exceptions shall con-

> ists of the Chancellor and such other judges of the *particular court of common pleas wherein the case was tried* as are not debarred from service by illness or other potent reasons;—" (Italic ours)

The Court in banc which heard the post-trial motions of your petitioner was composed of judges from the 47th Judicial District and the 18th Judicial District. The petitioner was tried in the 5th Judicial District. No Member of the Court in banc was a judge of the particular court of common pleas wherein the cases were tried. It is submitted that since our courts have carried over the requirement of a Court in banc from the civil to the criminal law that the rules regarding the composition of that court should also be carried over and applied to the criminal law.

In *Carney v. Penn Oil Co., supra,* the Court went on to say:

> "And where the Chancellor happens to be a judge from another district invited into the court especially to preside, he, for the time being and for the purpose of completing all *cases in which he presided,* is a member of the court to which he was called, with all the powers and obligations of such membership *but with no other or greater powers;* if, for any proper reason, founded on interest or otherwise, *all permanent members* of a court are *debarred* from sitting in banc, they should call in another outside judge to perform that service." (Italic ours)

This language seems to limit the powers of a visiting judge to the case in which he *presided* and no other

except when all members of the local court are debarred from sitting.

In the instant case there was no showing that all the judges of the Court of Common Pleas of Allegheny County, Pennsylvania were debarred from sitting on the Court in banc. It is submitted, therefore, that in each case heard by the Court in banc, one of the visiting judges exceeded his authority in that he sat in place of a local judge. A visiting judge does not have the power to sit on a Court in banc hearing motions for a new trial and in arrest of judgment regarding a case at which that judge did not preside. The fact that he presided at a trial of the same defendant about the same time does not change the limitation of his powers. The defendant, your petitioner, should not have been confronted with a Court composed of the two visiting judges who had presided at his trials. He was entitled to have a Court in banc composed of the trial judge and at least one local judge. The Court in the instant case was not properly constituted.

This violation of the rights of the petitioner constituted a deprivation of liberty without due process of law.

CONCLUSION

For the reasons set forth herein, we respectfully submit that this petition for a Writ of Certiorari should be granted.

L. PAT MCGRATH
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that I have served by mail upon Robert W. Duggan, District Attorney of Allegheny County, Pennsylvania, five copies of the foregoing Petition for a Writ of Certiorari.

L. PAT MCGRATH
Attorney for Petitioner

IN THE

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L. PAT MCGRATH
1703 Grant Building
Pittsburgh, Pennsylvania 15219
Attorney for Petitioner

CONCLUSION

For the reasons as set forth in the First Case, we respectfully submit that this Petition For A writ of Certiorari should be granted.

L. PAT MCGRATH
Attorney for Petitioner

CERTIFICATE OF SERVICE

I Certify that I have served by mail upon Robert W. Duggan, District Attorney of Allegheny County, Pennsylvania, five copies of the foregoing Petition for a Writ of Certiorari.

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APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA v. JAMES R. MCCARTHY	No. 2697A Miscellaneous Docket

Docket Entries

November 9, 1965, Petition of James R. McCarthy for the allowance of an appeal from the judgment of the Superior Court at Nos. 126, 127 April Term, 1965, filed.

ORDER

December 20, 1965

Petition denied

Per Curiam.

December 30, 1965, Petition for reconsideration of petition for allowance of appeal, filed.

January 4, 1966, Answer filed.

ORDER

February 10, 1966

Petition denied

Per Curiam.

March 30, 1966, Notice of appeal to Supreme Court of the United States, filed.

For Appellant:
L. PAT MCGRATH

APPENDIX B

IN THE
SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA v. JAMES R. McCARTHY, Appellant.	Nos. 126 and 127, April Term, 1965.

Appeal From the Judgments of Sentence of the Court of Quarter Sessions of Allegheny County at Nos. 672 and 673 September Sessions, 1963, and Nos. 514, 516, 517, 518, 519, 521, 522, 523, 525, 527, 529, 530 and 531 April Sessions 1963.

Filed October 15, 1965

PER CURIAM

The judgments of sentence are affirmed and the defendant is directed to appear in the court below at such time as he may be there called, and that he be by that court committed until he has complied with the sentence, or any part of it which had not been performed at the time the appeals were made a supersedeas.

APPENDIX C

IN THE
COURT OF QUARTER SESSIONS OF THE PEACE
AND GENERAL JAIL DELIVERY
OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA
v.
JAMES R. MCCARTHY
} Nos. 672-673 September Sessions, 1963.

Opinion

Before the HONORABLE LLOYD F. WEAVER, P.J., Eighteenth Judicial District, Specially Presiding; and the HONORABLE ALTON A. MCDONALD, J., Forty-Seventh Judicial District, Specially Presiding.

MCDONALD, J.:

James McCarthy, defendant, was charged in indictments Nos. 672-673 September Sessions, 1963, with the crime of false pretenses. Upon trial before a jury, verdicts of guilty to both indictments were returned.

Motions for new trial and in arrest of judgment, setting forth the pro forma reasons, were filed. In addition, the motion for new trial alleges, in Paragraph 6, that during the deliberations, a juror suffered an asthma attack and immediately thereafter changed his ballot from "not guilty to guilty"; and in Paragraph 7, that a juror was "approached on two different occasions during recesses in the course of trial by a witness for

the Commonwealth, causing prejudice to the defendant." The procedures for establishing facts for the Court to act upon these two allegations were not taken and they were therefore not argued.

The motions were argued before a court en banc. Briefs were not submitted by the defendant or the Commonwealth, and therefore we dispose only of those matters which appear in our notes recorded at the argument.

William Wyatt, Sr., prosecutor in No. 673 September Sessions, 1963, an insurance agent residing in Pittsburgh, testified that he had met defendant in October, 1961, while delivering automobile policies to the latter. They engaged in a general discussion of defendant's business. Defendant told Wyatt he was president and owner of a corporation, Foundrymen's Equipment & Supply Company, Inc.; that he needed $5,000 to continue extraction of copper residue which was "under acid" at a leased slag pile in Langeloth. With this money, defendant stated, he would be able to employ men and realize $50,000 from the sale of the residue within thirty days. Wyatt agreed to give him a check for $5,000 in "escrow" (as termed by the witness) to be used in obtaining a loan at the Pittsburgh National Bank. It was agreed that Wyatt and defendant would see Joseph Chesnos, Wyatt's friend, and Vice President of the bank on the following Monday to negotiate a $10,000 loan. Defendant would then return the $5,000 to Wyatt and use the additional $5,000 for the business. On the date the check was turned over to defendant, he handed Wyatt a letter (Commonwealth Exhibit No. 2) bearing the letterhead "Foundrymen's Equipment & Supply Company, Inc." which acknowledged receipt of $5,000

to be repaid within thirty days and giving Wyatt an option to convert this amount into stock of Langeloth Smelting & Refining Company and Foundrymen's Equipment & Supply Company. It also stated that Wyatt could then take part in the organizational end of management and become a member of the Board of Directors, with the right to purchase stock. Wyatt contended this letter was unsolicited, that defendant insisted on giving it to him, and they then agreed that on the following Monday when Wyatt received his $5,000 the letter would be returned. At sometime after October 30, he received a judgment note from defendant for $5,000.

Defendant did not appear at the bank on Monday, and later that week informed Wyatt the $5,000 had been used for business purposes and he would need another $5,000 before approaching Mr. Chesnos for the loan.

Subsequently, Wyatt was requested to attend a meeting on November 19, 1961, at Burgettstown with other people who had invested in the business. Defendant was not there, but a Mr. Valieriano, who represented himself as an accountant, conducted the meeting. The forming of a corporation under the name of Foundrymen's Equipment & Supply Company, Inc., or Metallic Residues Company, was discussed by the persons assembled. Wyatt said he did not take part in the discussion. Three months after October 30, 1961, at defendant's request, Wyatt met with him and an attorney, James Hardie, and again the subject of a corporation was discussed. Wyatt states he did not participate in this discussion, and that he was only interested in getting his money back.

Appendix C.

William Wyatt, Jr., prosecutor in No. 672 September Sessions, 1963, testified that on several occasions during October and November, 1961, defendant discussed with him the purchase of "exothermic furnaces". These furnaces were to be leased. According to Wyatt, Jr., defendant said five furnaces were needed and he exhibited two of these to him but neither one had been assembled. Further, that the furnaces would produce an aggregate of $350 net per day when in operation. At defendant's request, Wyatt, Jr., agreed to lend him $3,000 to purchase the furnaces which were valued at $700 each. The money was advanced by Wyatt, Sr., and paid directly by him on behalf of Wyatt, Jr., to the defendant on November 15th and 18th, 1961. A note was given to Wyatt, Jr., in the principal amount. In addition, it was agreed he was to become an agent for leasing of the machines. At no time thereafter did Wyatt, Jr., ever see the furnaces defendant proposed to purchase.

Both Wyatt, Sr., and Jr., testified they had advanced the money on defendant's representation that Foundrymen's Equipment & Supply Co., Inc. was a corporation of which he was president.

Commonwealth Exhibit No. 7 was a certification by the Secretary of Commonwealth that no corporation was registered in his office under the name of Foundrymen's Equipment & Supply Company, Inc.

Defendant testified he had secured a lease from Langeloth Steel Corporation of a slag pile located in Langeloth, Pennsylvania. He said, in association with others, the process of extracting copper residue was begun. He intended to form a corporation under the name, Foundrymen's Equipment & Supply Company,

Inc., and consulted with an attorney John Brumer of Burgettstown, for that purpose. In a conversation with Wyatt, Sr., the matter of financing the business was discussed. Later, defendant asked Wyatt for a loan of $5,000 to be used as a credit base to obtain a loan of $10,000 from the Pittsburgh National Bank. The $15,000 would then be used in the business. He agreed to meet Wyatt, Sr., at the bank the following Monday to negotiate the loan. He said it was agreed the money would be repaid in thirty days or Wyatt could come into the business. In such case he was to be an officer and director of the corporation.

Defendant explained his failure to meet Wyatt at the bank as agreed by stating his accountant was to prepare a "balance sheet" for loan purposes and it had not been finished on time.

Defendant denies he ever represented himself as president of a corporation, but always referred to himself as the "owner" of Langeloth Smelting & Refining Company which was registered under the Fictitious Names Act.

Subsequently, according to defendant, when Bruner was not proceeding with the incorporation, he consulted Attorney James Hardie. Wyatt was present. Hardie suggested the name be changed to Metallic Residues Company, Inc. Defendant testified a corporation under this name was formed after January, 1962, but stock was never issued to the investors. He said at no time did he represent himself as president except during a week in July, 1962 (it was later stipulated by counsel that a circular was published in October, 1962, in which defendant was represented as president and chairman

of the Board of Directors of Metallic Residues Company, Inc.)

He says after 30 days from October 30th, Wyatt elected to stay in the business and the $5,000 in the meantime had been used for expenses.

In December, 1961, having received between 35 or 40 thousand dollars from other investors, he had extracted 3-5 tons of copper residue which sold for $190 a ton. The total amount extracted from the Langeloth pile was about 120 tons, although he says 50,000 tons had been treated. He said the action of investors, who had formed a pre-incorporation association, by not following through after incorporation of Metallic Residues Company, Inc., forced him to close down operations at the Langeloth slag pile.

Defendant testified that he constructs and had applied for patent on a device called the "Exothermic Furnace" and with the money received from Wyatt, Jr., the parts necessary for the construction of five furnaces had been purchased. He said it was agreed Wyatt, Jr., was to act as leasing agent for the furnaces, although there was no understanding about compensation for these services. He admits the furnaces were never constructed.

Kathleen Armstrong Carman, formerly employed as secretary to the defendant, testified the operation at Langeloth was under the name of "Langeloth Smelting & Refining Company"; that when the corporation was planned, she ordered stationery with the letterhead, "Foundrymen's Equipment & Supply Company, Inc." She also testified she had taken notes at a meeting on

December 19, 1961, when Wyatt, Sr., and other investors were present and agreed to form a corporation.

Several witnesses testified for the defendant that they had invested money in the business; that a meeting was held December 19, 1961, at which Wyatt, Sr., was present, and the incorporation of Foundrymen's Equipment & Supply Company, Inc., or Metallic Residues Company, Inc., was discussed.

James Hardie, Esquire, testified he had met with defendant and Wyatt, Sr., on November 27, 1961, and was employed by defendant to do the legal work necessary to the formation of a corporation. However, Wyatt, Sr., did not take active part in the discussion. Mr. Hardie says it was he who suggested the name of the corporation be Metallic Residues Company, Inc., rather than Foundrymen's Equipment & Supply Company, Inc. The application was filed and the corporation registered December 5, 1961. However, since defendant had not paid his bill for services, the evidence of incorporation was not turned over to him. In the fall of 1962, a Lawrence Paper, under instruction from the defendant, obtained the corporate certificate and stock book from Mr. Hardy.

By stipulation of counsel, it was agreed a circular offering stock for sale in Metallic Residues Company, Inc., was published October 15, 1962. In this circular the defendant appears as president and chairman of the Board of Directors, and Lawrence M. Paper as a director.

The defendant contends the evidence was insufficient to sustain verdicts of guilty, and therefore the Court should grant his motion in arrest of judgment.

Appendix C.

Under the act of 1951, P.L. 585, Section 1 (19 P.S. 871), in deciding if a motion in arrest of judgment should be granted, the Court must ignore evidence of defendant and his witnesses which the jury had the privilege of rejecting, and must accept as correct all the evidence which supports the verdict. From this, it may draw such reasonable inferences as will support the verdict: Commonwealth v. Wright, 383 Pa. 532; Commonwealth v. Ornato, 191 Pa. Superior Ct. 581. The testimony will therefore be evaluated in the light of this Rule.

The crime of false pretenses requires proof of a false representation of an existing fact, a reliance on the false representation and the obtaining of money (or something of value) as a result thereof. The false representation must have been made with an intent to defraud: Commonwealth v. Silia, 194 Pa. Superior Ct. 291; Commonwealth v. Conners, 201 Pa. Superior Ct. 500.

The pivotal issue in these cases is whether defendant had falsely represented to Wyatt, Sr., and Wyatt, Jr., that he was president of a corporation known as Foundrymen's Equipment & Supply Company, Inc., at the time he obtained money from them, and that said corporation had a lease on a slag pile at Langeloth.

Wyatt, Sr., and Jr., both testified that in conversations with defendant, at which requests were made for money, he represented himself as President of Foundrymen's Equipment & Supply Co., Inc. At the same time, he painted a glowing picture of a new, lucrative and stable business, in which the corporation was engaged, both in the extraction of copper residue and the leasing of "exothermic furnaces".

According to Wyatt, Sr., he advanced $5,000, not as an investment but in "escrow" to provide defendant credit for the purpose of securing a loan. The money was to be returned within a few days when the loan was obtained. It was not. In fact, within those few days it had been used by the defendant for other purposes.

Wyatt, Jr., advanced the sum of $3,000 to be used by the corporation to purchase parts for the construction of five exothermic furnaces. These were to produce a large net income per day. He was to be leasing agent for these furnaces. They were never constructed.

It was for the jury to decide whether a false representation was made, that money was advanced as a result thereof, and defendant fraudulently intended at the time it was made that it would induce Wyatt, Sr., and Jr., to advance the money: Commonwealth v. Conners, supra; Commonwealth v. Matthews, 196 Pa. Superior Ct. 60. The facts, inferences therefrom, credibility of witnesses and weight of the testimony are for the jury to determine: Commonwealth v. Kloiber, 572 Pa. 412.

As circumstances which strengthen the Commonwealth case, and from which the jury could draw reasonable inferences, we note the letter (Commonwealth Exhibit No. 2) which Wyatt, Sr., says was given him at the time the check was handed defendant, but upon condition it would be returned when the loan was obtained, was typed on stationery bearing the letterhead, "Foundrymen's Equipment & Supply Company, Inc."; that despite the investment of thirty five-forty thousand dollars, which defendant admits he had obtained from investors, only about $950 worth of copper had been sold by the time the operation was closed down in February,

1962; the corporation had never formed (Commonwealth Exhibit No. 7); the exothermic furnaces for which $3,000 had been advanced by Wyatt, Jr., had never been constructed.

We are satisfied the evidence of the Commonwealth required submission to the jury, and if believed was sufficient to satisfy it beyond a reasonable doubt of defendant's guilt.

Defendant argues the actions of Wyatt, Sr., after October 30, when the money was advanced, together with Commonwealth Exhibit No. 2, contradict his testimony that he was told Foundrymen's Equipment & Supply Company, Inc., was a corporation and had advanced the money in reliance on it. His testimony, as well as that of other witnesses, indicates that after October 30, 1961, he met with Attorney Hardie on one occasion, and with certain other investors on another. Both times the formation of a corporation was discussed. In explaining these negotiations, he said he wanted only to get his money back. Mr. Hardie's testimony of a conversation with Wyatt, Sr., several days after the first meeting supports this. Whether this explanation could overcome the inconsistencies in the Commonwealth's case was a question of credibility. It was reasonable for the jury to infer that Wyatt, Sr., realizing the defendant had obtained the money by falsely representing there was a corporation, was willing and anxious to recoup it in any way he could. It was for the jury and not the trial judge to decide the significance of his action.

The language in Commonwealth Exhibit No. 2 does contradict the version of Wyatt, Sr., as to the agreement under which the $5,000 was advanced. However,

again the jury rather than the trial judge had to decide whether his explanation that the letter had been given to him unsolicited, and was to be returned the following Monday when the loan was obtained, was credible. In view of defendant's admission that he was to meet Wyatt at the bank the following Monday, and failed to do so, Wyatt's explanation seems reasonable. It also must have occurred to the jury, and they could draw inferences from the testimony, that if defendant and Wyatt were to meet at the Pittsburgh National Bank to obtain a loan, an important requirement of which would be the $5,000 check, why was it deposited in another bank and used for other purposes. Even if defendant's version of the transaction were accepted, i.e., that the $5,000 was a loan to be deposited and used with an additional bank loan of $10,000, serious doubt of his good faith is raised by the act of depositing the money in another bank and using it before the bank loan had been obtained.

In our view, the evidence of the Commonwealth was sufficient, after determining the credibility of witnesses, to satisfy the jury beyond a reasonable doubt that defendant had falsely represented to Wyatt, Sr., and Jr., that Foundrymen's Equipment & Supply Company, Inc., was a corporation; and that it was intended thereby to create the illusion of a lucrative, viable and going business for the express purpose of obtaining $5,000 from Wyatt, Sr., and $3,000 from Wyatt, Jr.

Defendant also argues on this motion that Wyatt, Jr., did not advance anything of value and therefore the Commonwealth has failed to prove the crime of false pretenses in Indictment No. 672, September Sessions, 1963. The testimony indicates that Wyatt, Jr., did not personally advance the $3,000 on the "exothermic fur-

naces" deal. This amount was given to the defendant by Wyatt, Sr., on behalf of Wyatt, Jr. A note in the amount of $3,000 was given to Wyatt, Jr. Thus, the contract was between the defendant and the latter, regardless of how payment was made. Wyatt, Jr., also testified that this advance, although made directly to defendant by Wyatt, Sr., was in the nature of a loan by his father to him. He thus has incurred a debt, and we fail to see how defendant can argue convincingly that he has not parted with anything of value as the result of the false representation made to him.

We are satisfied the evidence was sufficient for submission to the jury, and defendant's motion in arrest of judgment must be denied.

The motion for new trial is also without merit. Much of the discussion above is applicable to this motion. Defendant has raised no objection to the charge of the trial judge or to any of his rulings. The testimony was contradictory and raised questions of fact to be decided by the jury. In doing so, it accepted as credible the testimony of the Commonwealth witnesses and drew reasonable inferences necessary to its verdicts.

The jury, having decided that the testimony of the Commonwealth witnesses was credible, it was not difficult to infer that defendant intended to fraudulently obtain the money, both from Wyatt, Sr., and Wyatt, Jr. Lending support to this, was the failure of defendant to meet Wyatt, Sr., at the bank on Monday following October 30th, as he admits was part of the agreement; the almost complete failure to produce copper residue worth $50,000 within a month (only $950 worth being marketed in three months); the failure to construct the exothermic furnaces at any time (even though this was

not dependent upon the extraction operation). The overall picture, as the jury decided after determination of the witnesses' credibility, is one of calculated duplicity. Defendant's efforts to clothe his actions with legality were not convincing.

The motion for new trial must therefore be dismissed.

We conclude the defendant had a fair and impartial trial. The issues were submitted to the jury in a full and complete charge to which no objections were taken. Since the testimony was contradictory, it was necessary for the jury to determine the credibility of the witnesses in order to arrive at the verdict. We are convinced the evidence was sufficient to satisfy the jury beyond a reasonable doubt of defendant's guilt.

After argument, before a court en banc consisting of Judges Lloyd F. Weaver, P.J., 18th Judicial District, and Alton A. McDonald, J., 47th Judicial District, both specially presiding, an Order was made November 20, 1964, refusing defendant's motions for new trial and in arrest of judgment on verdicts of guilty filed to Nos. 672 and 673 September Sessions, 1963. This opinion is filed in support of that Order.

BY THE COURT

ALTON A. MCDONALD, J.
47th Judicial District,
Specially Presiding

I concur:

LLOYD F. WEAVER
18th Judicial District

APPENDIX D

IN THE COURT OF OYER AND TERMINER
OF ALLEGHENY COUNTY

COMMONWEALTH OF PENNSYLVANIA v. ARLENE KNOWLES JAMES R. McCARTHY	Nos. 514, 516, 517, 518, 519, 521, 522, 523, 525, 527, 529, 530, 531, April Sessions, 1963.

Before ALTON A. McDONALD, 47th Judicial District and LLOYD F. WEAVER, 18th Judicial District, both specially presiding as a Court en Banc.

For the Commonwealth:

ROBERT W. DUGGAN, District Attorney;
EDWIN J. MARTIN, Assistant District Attorney.

For the Defendants:

F. PETER DIXON, Esquire;
PAT McGRATH, Esquire;
McGRATH, McGRATH, McGRATH, AND DIXON.

Opinion and Order

WEAVER, J.

Arlene Knowles and James R. McCarthy were each indicted on nine charges of false pretense, nine charges of fraudulent conversion and one charge of conspiracy, nineteen indictments in all. The trial judge sustained demurrers to four charges, submitting fifteen cases to the jury for its consideration. The jury found neither defendant guilty of conspiracy. It found Arlene Knowles

guilty of seven cases of fraudulent conversion and James R. McCarthy guilty of seven cases of false pretense and seven cases of fraudulent conversion.

Motions for a new trial and arrest of judgment were filed and refused by order only. Arguments were heard by a Court en Banc, no briefs have been filed. Arlene Knowles was placed on probation and James R. McCarthy at 525 April Sessions 1963, fraudulent conversion case, was sentenced to two and one half years to five years in the Allegheny County Work House. Sentence on Nos. 523, 526, 527, 529, 530 was suspended. Sentence on 514, 516, 517, 518, 519, 521, 522 was suspended for two years.

James R. McCarthy one of the defendants, has appealed from the judgment and sentence.

The motions for new trial and arrest of judgment, having been refused, by order only, this opinion is filed for use of the appellate court. Defendant McCarthy raises no question of trial errors. The motions were argued, on but one basis that the evidence was not sufficient to sustain the charges and that the court erred in refusing defendant's demurrer.

Seven alleged victims, Skoff, Burns, Charles A. and Esther Zimmerly, Mariote, Fleishaker, Gesselman and Wenk, by indictment, charged defendants with the false pretense; that defendants represented to them they were negotiating a new lease for residue in a waste pile and were forming a new corporation to handle this waste, and if the victims would put in money they would be the incorporators and potential share holders, that the corporation would be named Metallic Residues Corporation and $10,000.00 was needed.

The victims by the indictments as to false pretense further allege the above representations were false in as much as the defendants were not negotiating a new lease for the residue and Metallic Residues Corporation had already been formed six months prior and they could not be incorporators, as said corporation was not in process of being formed and the sum of $10,000.00 was not necessary for the incorporation.

As to the fraudulent conversion charge, the victims by their indictments, aver that they paid the sum of $10,000.00 to defendants who were to deliver said sum to Attorney John W. McIlvaine who represented said defendants and McIlvaine was to hold in escrow the sum of ten thousand dollars to be used pending the incorporation of the Metallic Residues Corporation and for obtaining a new lease for residues and defendants failed to pay the said sum to the said John W. McIlvaine trustee, and that defendants refused to return the said money to the victims.

Altogether $20,500 was paid to defendants, the Zimmerly family paying $60,000.00 and the others, $2,000.00 each, except for one $500 sum. The testimony of the various victims supported the charges in the indictments. The defendants denied the victims were to be incorporators, and that they defendants represented they needed funds to incorporate and they denied there was any escrow trust agreement.

In considering motions for a new trial and arrest of judgment where verdict is for the Commonwealth, the evidence must be considered in the light most favorable to the Commonwealth; Commonwealth v. Stone 187 Pa. Super Ct. 236-238. The Court must ignore evidence of

the defendant and his witnesses and has the privilege of rejecting, must accept as correct all Commonwealth's or defendants' evidence which supports the verdict and must draw from evidence such reasonable inferences as will support verdict. Com. v. Donatelli 198 A. 2d 338, 202 Super Ct. 565, 1964; Com. v. Whiting 409 Pa. 492, 494 (1963).

Under the evidence in this case, the motion for arrest of judgment must be refused.

In the motion for a new trial, the defendant contends the verdict was against the weight of the evidence. If this be so, a new trial should be granted: Com. v. Harbaugh 197 Pa. Super 587 (1961).

From the evidence and reasonable inferences to be drawn therefrom, the jury would be justified in its verdicts. It could have found that in June 1962 defendant McCarthy was in financial difficulties, that he had no funds, was pressed by creditors and was in danger of losing everything he had which consisted of a controversial lease, dated June 15, 1961, in a residue pile at Burgettstown, Pa. from Langeloth Steel Company lessor to James R. McCarthy as an individual, this business was operated as Langeloth Smelting and Refining Co.; some nebulous assets of an Ohio Corporation formed by McCarthy, named the Associates Industrial Furnace Co., a Corporation, and a business operated under the name of Foundrymens Equipment and Supply Co. at New Brighton, in a rented plant 100 feet by 50 feet, which consisted of some type of an unpatented furnace for melting metals.

That McCarthy came in contact with a Mr. and Mrs. Charles Zimmerly at Springdale, Pa., and informed Zim-

merly he needed ten men who would work for $500 each a month, and would put $2000.00 each into a business venture; that this venture would be the formation of a corporation called the Metallic Residue Corporation; and the people who put in the $20,000.00 would be the incorporators; that he McCarthy would put into the new corporation the three firms he already operated; that $10,000.00 of the paid in money would be used to form this new corporation, pay lawyers fees, and operate the business, and $10,000.00 would be placed in a trust fund with his attorney, McIlvaine to obtain a new lease on the slag pile, and if this was not done the $10,000.00 would be returned to the payors. The jury could have found Zimmerly loaned McCarthy $750 for pressing financial needs (this sum was later repaid); that McCarthy represented to some of the victims that he was a metallurgist, whereas he never finished high school, he did do some school work while in the army that could be considered equivalent to a high school course; that he had stated he had operated the laboratory of the University of Illinois, whereas he only had access to use some of the facilities of such school, during a summer; that he told several of the victims he owned the plant at New Brighton, whereas he rented the building and only owned some of the contents of that building; that he employed all of the victims but one for a period of from two to four months at a monthly wage of $500 and made one period of two weeks payment by checks, of which $675.00 was all that was ever actually paid, payment of checks was refused, no money in bank and the $675.00 was collected by an attorney; that the statements to obtain the $20,000.00 were made by McCarthy personally, but he had no money in a bank account in that name—he deposited

all funds in the Ohio Corporation bank account, namely, the Associates Idustrial Furnace Inc.—so that collection could not be made on judgments against him, McCarthy; that after he obtained the $20,000.00, McCarthy took no interest in operating the slag pile or the plant; he obtained no materials for said operation and had no credit rating, so materials could be purchased on time; he told the men to just stand around the slag pile; that the only operation at New Brighton was when a prospect, for obtaining money, was brought to the plant; that McCarthy represented that acid, to operate the slag pile, could be obtained for hauling it, whereas it cost $400 a load and he would not pay it; that he sent one of the victims out to buy materials without giving him money for said purchases and this victim spent some $74.00 of his own money for gasoline which was not paid by McCarthy, this same victim also received no pay for his four months work. The jury could have found, as the victims testified, that the judgment notes were not evidences of a loan for debt but were to take the place of receipts with options to later purchase stocks; that the $20,000.00 was not used for the purposes, McCarthy represented it would be used, but it was used primarily to pay debts due from McCarthy and Knowles. The jury could have found that the worthless check for $10,000.00 given to attorney McIlvaine by McCarthy and Knowles was the $10,000.00 that was to be held in escrow; the jury also could have found the fact that McCarthy had a lease for the slag pile and operated for a year or longer using slag while nothing was ever paid to owners of the pile, Langeloth Steel Company; the jury could have believed the testimony of Sadie Fleishaker that attorney McGrath

told her she would never get her money back, it was "down the drain".

Not all of the testimony was pertinent to the charges of false pretense and fraudulent conversion, some of it was presented to prove the intention of McCarthy and to attack his credibility. Cheating by fraudulent pretenses is made a felony by the Criminal Code Act June 24, P.L. 872 sec. 836 1943—May 21, P.L. 306 Sec. 1-18 P.S. Sec. 4836.

The necessary elements of false pretense are that the defendant made a false pretense and by it obtained property or something of value with intention to cheat and defraud; the representation must be of an existing fact, and there must be a reliance of the victim on the false statement: Commonwealth v. Silea 166 Atl. 2d 73, 194 Pa. Super 291 (1961). The false representation of an existing fact may be by oral or written words or by conduct: Commonwealth v. Thomas 70 Atl. 2d 456—166 Pa. Super 214 (1950).

There was direct testimony in each of the seven false pretense cases that McCarthy represented to the victims they would be initial incorporators and be charter members of a corporation which was to be formed or was in the process of being formed, and that this corporation would be named Metallic Residues Corporation. Defendant denied this testimony. The jury believed the Commonwealth witnesses. There was direct evidence that six months prior to McCarthy's representations, a corporation had already been formed and named Metallic Residues Corporation and that the victims could not be the incorporators and charter members of that corporation. There was positive and direct evidence, which was not denied and both defendants testified, McCarthy ob-

tained property or something in value, namely, at least $2000.00 from each of the victims and there was positive testimony by each of the victims they relied on the false representations of McCarthy. The jury believed this testimony. The positive testimony of false assertions was to an existing fact and the offense of obtaining money by false pretenses was complete even though it was coupled with promises to give jobs to the victims in the future: Commonwealth v. Gross 56 Atl. 2d 303, 161 Pa. Super 613 (1948). The intention of Mr. McCarthy to defraud is a reasonable finding from the testimony that after the money was paid he did not use it for the purposes for which he obtained it; that he made other false representations. The jury considered that his financial condition was so bad, his need for money was urgent, nevertheless, he hired men to stand around and do nothing; they could consider that he placed the money in a bank account that the victims could not levy on in a civil suit to recover their money; that he represented himself to be a metallurgist and that he had operated a laboratory for a university; that he owned real estate, all of which the jury could and did believe to be false. The intention to defraud was shown by his failure to make an effort to operate the projects, to supply the money for the necessary materials, that he operated one plant only when prospective money producers were present, in fact the entire testimony indicates an intention to obtain money from these victims with no intention to use it except for his and his secretary's prior debts and purposes.

The verdict in the false pretense cases was not contrary to the evidence, against the weight of the evidence or contrary to law. The jury decided McCarthy's testi-

mony was not credible. Appellate courts have decided that similar evidence is sufficient to sustain a conviction of a false pretense charge: Com. v. Silia 166 Atl. 2d 73, 194 Pa. Super 291 (1961); Com. v. Heintz 126 Atl. 2d 498, 182 Pa. Super 33 (1956): Com. v. Dempsey 22 Atl. 2d 76, 146 Pa. Super 124 (1941).

We will next consider the fraudulent conversion cases. The gist of the offense of fraudulent conversion is the withholding of another's property, with intent to defraud or deprive that person of use and benefit of his property and to convert and apply the same to defendant's own use or benefit as against the owner: Com. v. Doria 163 Atl. 2d 918, 193 Pa. Super 206 (1960), 18 P.S. Sec. 4834 note 3 for additional cases. The Criminal Code Act June 24, 1939, P.L. 872 Sec. 834 makes the offense a felony. The test is not whether defendant had right to withhold the money but whether in good faith he believed he had such right. Com. v. Souder 108 Atl. 2 2d 831, 176 Pa. Super 523 (1955); Com. v. Wiener 34 Pa. 369. However, an unlawful withholding with intent to make whole the true owner at a later date wil not exculpate the offender. Com. v. Boraiard 373 Pa. 59/61. Proof of felonious taking of money in an amount either greater or less than averred in indictment for fraudulent conversion will sustain conviction of such offense. Com. v. Spiegel 82 Atl. (2) 692, 169 Pa. Super 252 (1951). Evidence of owner's demand for and defendant's refusal to redeliver property is generally required. Com. v. Spiegel 82 Atl. (2) 692, 169 Pa. Super 252 (1951) but is not controlling where his actual misapplication is established by other evidence. Id.

McCarthy was sentenced to imprisonment in the Allegheny County Workhouse on the charge at 525 April

Sessions 1963 wherein the victims were Charles A. and Esther Zimmerly his wife. Esther Zimmerly was the prosecutrix in all of the actions discussed in this opinion. She and her husband suffered the greatest loss. We will discuss the testimony as it applies to the victims Zimmerly at 525 April Session 1963. The testimony in all the other cases is similar.

The jury would have been justified in finding from the testimony that McCarthy agreed to put $10,000.00 of this sum in a trust fund to be placed in escrow with attorney McIllvaine and to be used to negotiate a new and better contract with Langeloth Steel Company, that the first $10,000.00 paid was to go into the trust fund; that on June 25, 1962, Charles and Esther Zimmerly gave McCarthy two cashier's checks, each for two thousand dollars. These checks were payable to the Zimmerlys jointly and endorsed by them and a condition of the agreement was, if no new contract was obtained this $4,000.00 was to be returned to the investors. On July 12, 1962, an additional $2000.00 was paid by Zimmerlys, this payment being by a check of H. Burns who owed Zimmerlys and was instructed by Zimmerlys to pay it to McCarthy for additional investment of $2000.00 by the Zimmerlys.

That on July 9, 1962, eight thousand dollars had been paid in, of the $10,000.00 trust fund, this sum being made up of payments by Zimmerlys $4000.00, June 25, 1962; by Burns, $2000.00, June 25, 1962, and J. Skoff $2000.00, June 27, 1962, and the remaining $2000.00 was put in July 9, 1962, by Al Wenk, another victim. This $10,000.00 fund was necessary as a guarantee of good faith before the officers of Langeloth Steel Co. would enter into negotiations for a new contract. The remaining investments were made as follows:

Appendix D.

July 12, Zimmerly	$2000.00
July 18, Fleisher	$2000.00
July 31, Skoff	$2000.00
Aug. 8, Gesselman	$2000.00
Aug. 27, Mariotte	$2000.00

These sums were to be used for the formation of the corporation and expenses of operation. The attorneys for Langeloth Steel Co, Bloom, Bloom & Yard wanted, to be sure McCarthy was financially responsible and that $10,000.00 would be available to operate under a new contract if one was negotiated; that McCarthy's attorney McIllvaine explained this to the victims, at McCarthy's request, at a meeting attended by McCarthy; that the escrow fund was never established as requested by Bloom, Bloom & Yard by the dead line they set June 28, 1962; that the dead line was extended one time after another until on August 22, 1962, when the negotiations for a new contract were terminated by Langeloth, McCarthy not having paid McIllaine the $10,000.00 escrow account. McCarthy did give McIllvaine a check dated July 6, 1962, for $10,000 payable to him as attorney trust account, but McCarthy told McIlvaine he did not have sufficient funds in the bank and to hold the check until McCarthy notified him the funds were available. McCarthy never so notified McIlvaine and the escrow trust was never established. October 1962 attorney McIlvaine tried to cash the check to repay the payors, as he testified the money was to be repaid, if a new lease was not negotiated. The bank refused payment, the reason being insufficient funds.

The Zimmerlys made demand for a return of their money in October and November 1962 and McCarthy refused payment.

The evidence was sufficient to establish, beyond a reasonable doubt, that $10,000 was paid into this escrow trust fund to be used for one purpose to obtain a new contract for the slag pile. Without the new contract, there was no object in the money being paid by the victims as the other $10,000.00 the victims paid was to operate the slag pile under the old lease if a new lease was not obtained. Three members of the Zimmerly family and McCarthy's attorney so testified. The only contra evidence was by McCarthy and Knowles the other defendant. The evidence of McCarthy's attorney, subpoened by both sides was convincing and credible, and was supported by the testimony of Wenk to the effect that McCarthy said at a meeting, attended by the victims, that his Wenk's $2000.00 completed the trust fund, and they could now go ahead to negotiate for a new contract. McCarthy's testimony was not credible in many respects but directly as to this trust fund it was most incredible. He testified Wenk's statement, supra was false, that all of the testimony as to "the $10,000, in escrow or the trust fund is also false". He testified there was no trust fund and no refund was to be made in the event no new lease was negotiated. Weighing his testimony against that of the Commonwealth and his own check given to his attorney for $10,000.00 made payable to John H. McIlvaine Attorney Trust Account, a jury could have come to no other conclusion but that McCarthy testified falsely.

The Commonwealth having proved money was paid to McCarthy for a specific purpose, that it was not used for the specific purpose, and was not returned on demand, it remained for the jury to determine if McCarthy converted the sum to his own use and had an intent to

defraud. The evidence of McIlvaine was McCarthy gave him the $10,000.00 check July 9, 1962, telling him he had but $6000.00 in the bank and to hold the check. The evidence, is clear, and the jury could so find that from June 25 to July 9, 1962, a period of just two weeks, the victims had paid McCarthy $10,000; there had been no operation by the victims in the ventures of McCarthy; the conclusion is inescapable that in that two weeks period McCarthy used and converted from this trust fund the sum of four thousand dollars. To find there was an intent to defraud from this testimony would be a justifiable finding by the jury.

There are many cases that have held similar proof to be sufficient to sustain conviction for fraudulent conversion: Com. v. Shutts 62 Atl. 2d 82, 163 Pa. Super 415 (1949); Com. v. Sherman 126 Atl. 2d, 480, 182 Pa. Super 319 (1956); Com. v. Willstein 22 Atl. 2d 613, 146 Pa. Super 357 (1942); Com. v. Stone 144 Atl. 2d 614, 187 Pa. Super 225, 150 Atl. 2d 871, 395 Pa. 584; Com. v. Spiegel 82 Atl. 2d 692, 169 Pa. Super 252 (1951) and Com. v. Vis 81 Pa. Super 384 (1923).

Some of the Commonwealth's testimony was contradictory, the jury was obliged to determine the credibility of all the witnesses. In Com. v. Koss 7 Atl. 2d 20, 136 Pa. Super 173 (1939) the Court decided where evidence in prosecution for fraudulent conversion was confusing and contradictory, guilt of accused was for the jury. Com. v. Koss 7 Atl. 2d 20, 136 Pa. Super 173, (1939).

The law applicable for the fraudulent conversion as to defendant's motions for arrest of judgment and new trial is the same as for the charges of false pretense discussed prior and will not be repeated.

Appendix D.

The trial judge has again gone over the testimony and the charge and finds the case was fairly submitted to the jury, that there was more than adequate testimony on which the jury could base a conviction on both charges beyond reasonable doubt and defendant's motions are refused.

The sentence of McCarthy and the probation of Knowles are justified. The sentencing judge had information at time of sentence of McCarthy's prior convictions at Nos. 672 and 673 September Sessions Allegheny County, in cases tried before the Honorable Alton A. McDonald, 47th Judicial District, Specially presiding. In those cases the jury convicted him of false pretense in obtaining some $8000 to operate the same slag pile and purchase furnaces of the type used at New Brighton. In these cases the defendant used the Foundry Men's Equipment and Supply Company as the basis for McCarthy's method of obtaining money. Judge McDonald was one of the members of this court en banc.

The Order refusing defendant's motion for arrest of judgment and a new trial was made by this court en banc, November 20, 1964.

BY THE COURT

LLOYD F. WEAVER
18th Judicial District,
Specially Presiding

I concur
ALTON A. MCDONALD
47th Judicial District,
Specially Presiding

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IN THE

Supreme Court of the United States

NO. 1229

OCTOBER TERM, 1965

JAMES R. McCARTHY, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

ANSWER AND BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

NO. 1229

OCTOBER TERM, 1965

JAMES R. McCARTHY, Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, Respondent

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

ANSWER AND BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, the Commonwealth of Pennsylvania, by ROBERT W. DUGGAN, District Attorney of Allegheny County, Pennsylvania, and EDWIN J. MARTIN, Assistant District Attorney, makes answer to the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania as follows:

OPINIONS BELOW

The ruling of the Superior Court of Pennsylvania is reported at *Commonwealth v. McCarthy,* 206 Pa. Super. Ct. 744, ... A 2d .... (1965), and as Petitioner's Appendix B.

The opinion of the state criminal trial courts are not reported but are set forth as Petitioner's Appendices C and D.

JURISDICTION

Jusisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the Petition is timely filed.

Whether a statute of the Commonwealth of Pennsylvania will be declared contrary to the Fourteenth Amendment to the Constitution when the issue has not been presented to the Courts of Pennsylvania.

Whether a statute of the Commonwealth of Pennsylvania is in violation of the Fourteenth Amendment to the Federal Constitution.

STATUTES AND CONSTITUTION INVOLVED

The pertinent provisions of the Pennsylvania Statutes and Pennsylvania Constitution of 1874 are not set forth in the Petition.

The pertinent provisions of the Act of 1911, April 27, P.L. 101, (Title 17, Purdon's Pa. Stats. Ann. Sec. 226, *et seq.*), and the Constitution of Pennsylvania, Article 5, Section 8 (Purdon's Pa. Stats. Ann., Constitution) are set forth in this answer at pp. 10, 11.

The pertinent provisions of the Federal Constitution and United States Code are set forth in the Petition.

COUNTER-STATEMENT

Petitioner was convicted in two separate criminal jury trials in the criminal courts of Allegheny County, Pennsylvania (Pittsburgh).

James R. McCarthy, Petitioner, was charged with the crime of false pretenses in two separate criminal indictments at No. 672 and 673 September Sessions, 1963 in the Court of Quarter Sessions of the Peace and General Jail Delivery of Allegheny County, Pennsylvania. Defendant was tried before the Honorable Alton A. McDonald, Judge, 47th Judicial District, Specially Presiding and a jury. The jury returned a verdict of guilty as to both indictments on April 15, 1964.

On May 13, 1964, James R. McCarthy and Arlene Knowles were tried in the same court on nineteen separate indictments at No. 513 through 531, April Sessions 1963 upon the charges of false pretenses, fraudulent conversion and conspiracy. The defendants were jointly charged with the crime of conspiracy to cheat and defraud at No. 513. At Nos. 514 through 522 inclusive, defendants were charged with the crime of false pretenses, and at Nos. 523 through 531 inclusive, defendants were charged with the crimes of fraudulent conversion. Trial was before the Honorable Lloyd L. Weaver, President Judge, 18th Judicial District, Specially Presiding and a jury. The trial judge sustained demurrers to four charges: Nos. 515, 520, 524 and 528. The jury returned a verdict of not guilty as to the charge of conspiracy at No. 513 April, 1963 and returned verdicts of guilty as to the other charges.

After each of the foregoing trials, the defendants filed the usual motions for new trial and motions in ar-

rest of judgment, wherein the sufficiency of the evidence was questioned. In addition, the motion for a new trial at Nos. 672 and 673 sets forth some factual allegations concerning the jury's deliberations and the conduct of the jury during the trial. However, these matters concerning the conduct of the jury were not pursued in accordance with the recognized procedures, and were not argued in the post-trial argument in the trial courts and were not presented to the appellate courts of Pennsylvania.

Post-trial motions were orally argued before a court *en banc* composed of the two criminal trial judges, both specially presiding. No briefs were presented to the trial court. Each trial judge wrote a separate Opinion in support of the refusal of post-trial motions (Petitioner's Appendices C and D).

In the post-trial motions for new trial and in arrest of judgment, petitioner asserted insufficiency of evidence upon which the juries could return verdicts of guilty (9, 12, 13, 14, 17).[1] The issues set forth in the present Petition were not presented to the court *en banc,* either by brief or orally.

Petitioner filed separate appeals to the Superior Court of Pennsylvania, in each of the two convictions. After continuances granted to petitioner, the appeals were orally argued on September 13, 1965. Typewritten briefs were submitted by petitioner in the Superior Court. The issues briefed and argued by petitioner in

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1. Numbers in parenthesis are references to page numbers in the printed appendices of the petitioner unless otherwise indicated.

the appellate court concerned the sufficiency of the evidence and the nature of evidence of the elements of the crime. The issues set forth in the present Petition were not presented to the Superior Court of Pennsylvania, either by brief or orally. On October 15, 1965, the convictions were affirmed without Opinion by the Superior Court (2).

A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on December 20, 1965. A Petition for Reconsideration was filed in the Supreme Court of Pennsylvania on December 30, 1965. The issue of constitutional rights was first presented in the aforesaid Petition for Reconsideration in the Supreme Court of Pennsylvania. On February 10, 1966 the Supreme Court of Pennsylvania refused to reconsider (1).

The date that this Petition was perfected is not known to the respondent.

Allegheny County constitutes the 5th Judicial District of Pennsylvania pursuant to Pennsylvania constitutional and statutory authority.[2] The judges who presided at the two trials of the petitioner were both elected to the bench of the Common Pleas Courts of other counties in the Commonwealth. They were assigned to specially preside in the Criminal Courts of Allegheny County pursuant to statutory authority as hereinafter set forth. The two trial judges constituted a court *en banc* before which the post-trial motions of the petitioner were orally argued.

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2. Pennsylvania Constitution of 1874, Article 5, Section 5. See also, Act of 1952, Jan. 8, P.L. (1951) 1844, No. 494, Sec. 1 (Title 17 Purdon's Pa. Stat. Ann. 784).

ARGUMENT

The petition is not timely filed within 90 days from the date of final adjudication in the Courts of Pennsylvania and the writ should be denied. The request for reconsideration addressed to the Supreme Court of Pennsylvania was not effective to toll the 90-day limitation.

Petitioner seeks to question the validity of a statute of the Commonwealth of Pennsylvania without having first properly raised the issue in the lower courts or the appellate courts of Pennsylvania.

The statute and Constitution of Pennsylvania are valid and are not offensive to the Federal Constitution. The petition does not set forth any valid reasons in support of the contention that petitioner has been denied due process of law.

The petition should be denied.

I. The Petition Is Not Timely Filed and Should Be Denied.

The respondent contends that the final judgment is the Order of the Supreme Court of Pennsylvania dated December 20, 1965, which refused petitioner's application for appeal from the Orders of the Superior Court of Pennsylvania. This being so, petitioner has failed to comply with the requirement that the Petition be filed within 90 days as required by the provisions of Rule 22 (1). Because of the above-mentioned failure, the Petition for Certiorari must be denied for want of jurisdiction. *Department of Banking v. Pink,* 317 U.S. 264 at 268 (1942).

Argument.

The issue is controlled by the holdings in cases such as *Department of Banking v. Pink,* supra, and *American Railway Express Company v. Levee,* 263 U.S. 19 (1923) and not by the holdings in cases such as *United States v. Healy,* 376 U.S. 75 (1964).

Under the law of Pennsylvania appeals from convictions in criminal cases, other than homicide, must be taken to the Superior Court. Act of 1895, June 24, P.L. 212, Section 7 as amended 1963, Aug. 14, P.L. 819, Section 1. (Title 17, Purdon's Pa. Stats, Ann., Section 182,—1965 Supplement; see also, Section 191.4,—1965 Supplement.)

The Supreme Court of Pennsylvania may allow an appeal from the Superior Court in criminal cases in accordance with statutory authority under the Act of 1895, June 24, P.L. 212, Section 7 (e) as amended 1963, August 14, P.L. 819, Section 1 (Title 17, Purdon's Pa. Stats. Ann., Section 190, and 1965 Supplement). The Supreme Court of Pennsylvania also has the statutory right to prescribe rules governing the practice and procedure in all appeals from any adjudication to the Supreme Court of Pennsylvania. Act of 1953, July 29, P.L. 1012 (Title 17, Purdon's Pa. Stats. Ann., Section 67). See also, Article 5, Sec. 2, Constitution (Purdon's Pa. Stat. Ann., Constitution).

Petitioner made application for the allowance of an appeal from the Superior Court to the Supreme Court of Pennsylvania in accordance with Section 7 (e) of the Act of 1895, supra, and in accordance with Rule 69 of the Supreme Court of Pennsylvania. The application for appeal was denied on December 20, 1965, without hearing or argument, on Petition and Answer. Thereafter, Petitioner requested reconsideration by the Supreme Court

of Pennsylvania and this was refused. Although Rule 71 of the Rules of the Supreme Court of Pennsylvania provides for the filing of a "Petition for Reargument", that rule is not applicable to the present matter. There is no express authority, either by rule or by statute, for reconsideration of the refusal of an appeal by the Supreme Court of Pennsylvania.

Even assuming, for the sake of argument, that the Supreme Court Pennsylvania could have allowed an appeal as a result of the application for reconsideration, the second application for appeal was not effective to toll the 90-day time for appeal. To hold otherwise, would permit applications for certiorari to the Supreme Court of the United States to be prolonged indefinitely by repeated applications to the highest appellate court of Pennsylvania by the same method.

The appellate rights of Petitioner were finally adjudicated by the Order of the Supreme Court of Pennsylvania rendered on December 20, 1965. This being so, the Petition was not timely filed and should be denied. *Cole v. Violette,* 319 U.S. 581 (1943); *Department of Banking v. Pink,* 317 U.S. 264 (1942). Because of the fact that there was no hearing originally granted by the Supreme Court of Pennsylvania, the circumstances are entirely different than are present when an application for a rehearing will toll the running of the 90-day appeal period.

II. The Petition Should Be Denied When It Seeks to Question the Constitutionality of a Statute of Pennsylvania Without Having Timely Raised the Issue in the State Courts.

There was no timely objection to the make-up of the court *en banc* which heard the post trial motions filed by petitioner. Failure of petitioner to make contemporaneous objection will preclude vindication of federal constitutional rights. *Henry v. Mississippi*, 379 U.S. 443 (1965). The issue was not presented to the Superior Court of Pennsylvania, which court had direct appellate jurisdiction in the present case. Thereafter, the issue was not presented to the Supreme Court of Pennsylvania in the original request for allowance of appeal. The matter set forth in the Petition was first raised by request for reconsideration addressed to the Supreme Court of Pennsylvania.

Contemporaneous objection is required by the courts of Pennsylvania.

Although not set forth in the Petition, this is an attack on a statute of Pennsylvania duly enacted by the Legislature of Pennsylvania. The Act of April 27, 1911, P.L. 101, as amended, provides that a law judge of any court of Common Pleas or Orphans' Court who can spare the time to sit in any other district may file a statement of his availability with the prothonotary of the Supreme Court of Pennsylvania: (Title 17, Purdon's, Pa. Stat. Ann., 226). Section 2 of the Act of 1911 provides a register of any available judges shall be maintained. Section 3 of the Act of 1911, as amended in 1933, sets forth that, upon assignment of a judge to specially preside in another judicial district, any judge so called

has "the same power and authority as vested in the judge or judges of said district . . ." (Title 17, Purdon's Pa. Stat. Ann. 228).[3]

Having failed to make timely objection to the constitutionality of the Act of 1911, the petitioner should be precluded from presenting the matter at this time. The Petition should be denied.

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3. "Any president judge of any such court where there is only one judge, or a majority of any such court where there is more than one judge, being of the opinion that it is necessary for the purpose of expediting the business of the said court, shall have the power to call upon any of said judges, so registered as aforesaid, by transmitting a written request to the prothonotary of the Supreme Court, who shall forthwith send such request to the judge so called upon. If no particular judge is designated in the call, then the prothonotary shall transmit the request to one of the judges who is registered upon the docket as having time to spare during the period named in said call. The judge who responds to any call under this section, and files with the prothonotary a certificate that his own work has been completed or that a substitute judge will not be required in his district because of his absence, shall thereupon be assigned to specially preside in the district from which the call has come, for the purpose of transacting the business thereof, with the same power and authority as vested in the judge or judges of said district: Provided, That no judge shall be assigned to any district while any judge thereof is assigned to and presiding in another district under the provisions of this act. 1911, April 27, P.L. 101, Section 3; 1933, June 1, P.L. 1139, No. 283, Section 1."

III. The Assignment of Judges in Pennsylvania Is Not Violative of the Constitution of the United States and Not Violative of the Constitution of Pennsylvania.

Respondent respectfully contends that the position of petitioner is devoid of merit and is frivolous. The Petition is devoid of merit because the statutory authority for the assignment of judges in Pennsylvania has been found to be valid by the decisions of the appellate courts of Pennsylvania. The Petition is frivolous because it is totally devoid of any valid reasons in support of the assertion there has been a "deprivation of liberty without due process of law".[4]

The appellate courts of Pennsylvania have interpreted the Act of 1911 and found the procedure for assignment of judges to be valid. In so doing, the decisions have interpreted the foregoing statutory authority in the light of the Constitution of Pennsylvania Article 5, Section 8. *Commonwealth v. Johnson,* 236 Pa. 412, 84 Atl. 824 (1912). *Commonwealth v. Graffius,* 67 Pa. Super. Ct. 281, (1917). The validity of the quoted statutory authority under the Federal Constitution has never been tested.

The fifth article of the Constitution of Pennsylvania deals particularly with courts and judges in the 26 sections contained therein. *Commonwealth ex rel. Margiotti v. Sutton,* 327 Pa. 337, 193 Atl. 250 (1937).

Section 8 of Article 5 of the Pennsylvania Constitution provides as follows:

"The said courts in the counties of Philadelphia and

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4. At page 8 of the Petition.

Allegheny, respectively, shall, from time to time, in turn detail one or more of their judges to hold the courts of oyer and terminer and the courts of quarter sessions of the peace of said counties in such manner as may be directed by law."

The case of *Commonwealth v. Johnson,* supra, determined that pursuant to the Act of 1911, supra, common pleas judges could specially preside at trials in the Counties of Allegheny and Philadelphia under the quoted section of the Pennsylvania Constitution.

It is obvious that if the judges who specially preside in the criminal courts of Allegheny County, Pennsylvania have the same powers as the elected law judges of that county, then they have the power to sit as a court *en banc* to hear post-trial motions and dispose of the same. Those decisions which interpret the duties and powers of judges sitting on the equity side of the court are not applicable to the problem here raised.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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EDWIN J. MARTIN
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May 16, 1966